In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1971

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE APPELLANTS REGARDING THE SUGGESTION OF MOOTNESS

Appellees SCRAP, *et al.* (but not appellees ISIS and NARI) have suggested that this case is moot because, if the district court's judgment is affirmed, the Commission will reexamine the railroads' need for revenue, the rate structure, and the environmental concerns as they stood during 1972 and 1973, the time during which the increases in Ex Parte No. 281 were under original consideration. For the reasons discussed below, we submit that this case is not moot.

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1. Although, under the district court's order, the Commission's inquiry would be directed to the relevant considerations as they were in 1972 and 1973, if the Commission concluded after this new inquiry that the increases originally permitted were not just and reasonable it would not only order the rates to be reduced but also direct the railroads to refund any excessive rates they have collected.[1] The possibility that the Commission would make such an order is more than adequate to assure that this is a live controversy, particularly since the district court warned that if the Commission did not order a rate reduction upon remand it might be compelled to set aside the Commission's action.[2]

In this proceeding, the Commission gave careful and thorough consideration to the environmental consequences of the rate increases on recyclables and concluded that there would be no significant environmental impact—a conclusion confirmed by the impact statement issued subsequently in Ex Parte No. 295. To the extent that appellees' suggestion of mootness rests

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[1] See J.S. App. 2d (341 I.C.C. 295) where the Commission stated that "[b]oth the surcharge and the selective increase proposals were made subject to a provision for refunds in the event the Commission ultimately finds that no increase or a lesser increase is warranted * * *." The Commission also stated (J.S. App. 39d, 341 I.C.C. 332) t hat "where maladjustments are found to exist an adequate remedy by way of refund or reparations will be provided." See 49 U.S.C. 13(1), 16(1) and 16(2).

[2] The district court stated (J.S. App. 50a): "We indeed might well question whether the Commission can allow the recyclable rate increases without clearly giving 'insufficient weight to environmental values.'"

on the improbability of the Commission's reaching a different result upon remand in Ex Parte No. 281, this is an argument that the district court erred in ordering the Commission to begin these proceedings anew, not an argument that the case is moot.

2. The rates currently being collected by railroads are established by tariffs that are cumulative in effect. They consist of a base rate and a series of adjustments or percentage increases authorized in general revenue proceedings. Each additional increase augments the previous base plus previous increases.[3] If the Commission were to determine, after the proceedings the district court has ordered it to undertake, that the increases in Ex Parte No. 281 are unlawful, this decision would reduce not only the rates collected in 1972 and 1973 but also the rates currently being collected.

3. In any event, even if reconsideration by the Commission of its order in Ex Parte No. 281 could have no present effect, the case would not be moot because the questions presented are recurring ones, capable of repetition yet potentially evading review. In recent years, railroads have been initiating general revenue proceedings at the rate of more than one per year.[4]

[3] In every general revenue proceeding the Commission directs the railroads to record in their tariffs that the rates have been increased by, and are collected under the authority of, the general revenue proceeding. See 341 I.C.C. 571.

[4] Since Ex Parte No. 281, which is involved here, there have been five general revenue proceedings: Ex Parte No. 295 (filed September 24, 1973); Ex Parte No. 299 (filed August 15, 1973); Ex Parte No. 303 (filed January 7, 1974); Ex Parte No. 305 (filed April 22, 1974); Ex Parte No. 310 (filed November 15, 1974).

The issues posed in this case will affect these proceedings. See *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498 (a case is not moot, even though the Commission's order has expired, because similar controversies might arise in the future).

Because it believes the decision below is incorrect, the Commission has continued to make the kind of environmental inquiries in general revenue proceedings that it made in this case, without conducting an in-depth examination of the underlying rate structure, which it is thoroughly investigating in Ex Parte No. 270 (J.S. App. 37a-38a, n. 44). Appellee NARI has commenced judicial proceedings against the Commission's decision in another general revenue proceeding (Ex Parte No. 295, Sub-No. 1), based in part upon this alleged flaw, which the district court here termed the "most fundamental and important deficiency" (J.S. App. 34a). Moreover, the Commission continues to assert that it has authority to conduct environmental investigations without entertaining oral hearings. The questions presented by this case and argued before the Court will survive and continue to be litigated unless they are resolved here.

Respectfully submitted.

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